0000108605

ORIGINAL

IZONA CORPORATION COMMISSION

RECEIVED

2002 MAY 28 A 11:47

AZ CORP COMMISSION
DOCUMENT CONTROL

Arizona Corporation Commission
DOCKETED

MAY 28 2002

DOCKETED BY

WILLIAM A. MUNDELL
Chairman
JAMES M. IRVIN
Commissioner
MARC SPITZER
Commissioner

**Docket No. RT-00000F-02-0271**

**IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996**

**AT&T'S COMMENTS ON SECTION 252(e) OF THE ACT AND RESPONSE TO QWEST'S COMMENTS REGARDING FILING OBLIGATIONS**

AT&T Communications of the Mountain States, Inc., and TCG Phoenix (collectively "AT&T") hereby file their Comments on the filing obligations contained in section 252(e) of the Telecommunications Act of 1996 and respond to Qwest Corporation's Comments regarding Filing Obligations.

## I. INTRODUCTION

AT&T believes it is important to step back and look at the issue from a distance to see and understand the big picture in order to frame the issue. Hastily framing the issue will simply cause one to answer the wrong question.[1]

The Staff initiated this proceeding to "examine whether [the agreements filed by Qwest with the Commission pursuant to the Procedural Order] should have been filed for approval with the Arizona Corporation Commission ("ACC") pursuant to Section 252(e)

[1] For example, Qwest states: "At issue is the standard for determining what contract provisions are subject to the 90-day approval requirement of Section 252." Qwest Comment at 1. AT&T disagrees.

of the 1996 Act, and if so, any appropriate remedial action which the ACC might consider." AT&T believes Staff has properly described the inquiry and issue.

Section 252(e) states: "*Any* interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State Commission." Emphasis added. Qwest's entire brief argues the word "any" means "some." Qwest tries to obfuscate the issue with needless distractions and justifications. AT&T sees the issue quite simply: Has Qwest entered into an agreement with a telecommunications carrier for interconnection, services or network elements? If the answer is yes, the agreement must be filed with the Commission for approval pursuant to section 252(e).

Qwest ignores the market power which the Company clearly possesses in its provision of local exchange service, as well as the incentives which the Company has to wield and perpetuate that market power. It presumes that effective competition already exists in the local market, and then insists that reasonable regulatory steps to prevent discrimination and to foster and encourage the development of competition are not only unnecessary, but contrary to public policy.

Qwest's arguments may be summarized as follows:

> 1. The Federal Telecommunications Act of 1996 ("the Act") is a "pro-competitive, and deregulatory" and therefore requires that the approval and filing requirements of section 251 and 252 be read in a narrow fashion.
>
> 2. The language of section 252(a)(1) requiring that an interconnection agreement include "a detailed schedule of itemized charges" for interconnection and each service or network element included in the agreement serves as a limit to which agreements must be filed and approved under sections 251 and 252.
>
> 3. Miscategorizing exempt contracts is contrary to public interest and the Act because a broader reading: a) imposes administrative burdens; b) undermines the incentives for ILECs to negotiate and rapidly settle

disputed issues; c) introduces a higher level of uncertainty into the contractual relationship between the ILEC and other carriers; and d) will impede the ability of ILECs and their competitors to develop pro-competitive and creative arrangements that serve to advance local competition.[2]

## II. ARGUMENTS

### A. Legal Analysis

The Act imposes several *general duties* on all telecommunications carriers, *specific obligations* on all local exchange carriers, and *additional obligations* on incumbent local exchange carriers.[3] Section 252(a) states that "[u]pon reviewing a request for interconnection, services or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting carrier..." Section 252(a)(1) of the Act states that "[t]he agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." The negotiated agreement must be submitted to the State Commission under section 252(e).

Section 252(e) states that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." The State commission shall approve or reject the agreement.

The State commission may only reject a negotiated agreement if the agreement, or portion thereof, discriminates against another carrier or is not consistent with the public interest, convenience and necessity. For an arbitrated agreement, or portion thereof, a State commission can only reject if it finds the agreement does not meet the requirements

---

[2] Qwest's Comments at 5.
[3] *See* 47 U.S.C. § 251(a), (b) and (c), respectively.

of section 251, including any regulations implemented pursuant to section 251, and section 252(d). The Act also states that for negotiated and arbitrated agreements, the State commission may establish or enforce other requirements of state law in its review of the agreement.[4] The Commission has 90 days to approve or reject a negotiated agreement and 30 days to approve or reject an arbitrated agreement.[5]

The Act also permits a Bell operating company ("BOC") to prepare and file with the State commission a Statement of Generally Available Terms and Conditions ("SGAT") to comply with the requirements of section 251 and Federal Communications Commission ("FCC") regulations implementing section 251.[6] The SGAT shall be submitted to the State commission for approval. The State commission may not approve the SGAT unless the SGAT complies with section 252(d), section 251 and any regulations implementing section 251. The State commission may also establish or enforce State law in its review. A State commission has 60 days to complete review or permit the SGAT to take effect. Nothing precludes a State commission from continuing its review after the SGAT takes effect.

Finally, section 252(i) states that "a local exchange carrier shall make available *any* interconnection service, or network element provided under an agreement approved under this section to which it is a party to any other requesting carrier upon the same terms and conditions as those provided in the agreement."[7] This requirement applies to negotiated agreements or arbitrated agreements.

---

[4] *Id.*, § 252(e)(3).
[5] *Id.*, § 252(e)(4).
[6] *Id.*, § 252(f).
[7] *Id.*, § 252(i) (emphasis added). The FCC's rules state that "[a]n incumbent carrier shall make available without unreasonable delay to any requesting carrier any individual interconnection, service, or network element arrangement contained in any agreement... upon the same rates, terms and conditions as those provided in the agreement." 47 C.F.R. § 51.809. Pursuant to the FCC's rules, individual arrangements

From a reading of section 252 of the Act, several principles emerge:

1. Parties can negotiate freely for interconnection, services and network elements. If they cannot agree, the State commission will enforce the provisions of the Act.

2. Negotiated agreements, arbitrated agreements and SGATs must be approved by the State commission.

3. Negotiated agreements and arbitrated agreements, or any portion thereof, may not discriminate against a carrier not a party to the agreement. For negotiated agreements, this requirement is contained in section 252(e)(2)(i), and for arbitrated agreements the notion is embodied in section 251(c) and is applied through review of arbitrated agreements pursuant to section 252(c) and (e)(2)(B).

4. A State Commission may establish or enforce other State law requirements.

5. Another requesting carrier is entitled to the same terms and conditions contained in an approved agreement, or any individual arrangement contained in the approved agreement.

To take the analysis one step further, if an agreement for interconnection, services or unbundled elements is not filed, the Commission cannot determine if other carriers are being discriminated against; cannot enforce State law requirements; if it is a negotiated agreement, cannot determine if it is consistent with its public interest, convenience and necessity; and other carriers cannot pick the agreement, or portions thereof, pursuant to section 252(i) and the FCC's rules because the agreement was not publicly disclosed. These are the public policy and legal requirements that are impacted by Qwest's election not to file the agreements with the Commission.

---

may be selected without adopting the entire agreement. The FCC's rule was upheld by the United States Supreme Court.

## B. Contrary to Qwest's Assertions, the Public Interest Requires a *Broader* Reading of the Approval and Filing Requirements of Sections 251 and 252

The purpose of the Act is to introduce competition into a local market which has been a monopoly for more than one hundred years. Then, once competition has been introduced, the Act has a continuing purpose to foster and encourage that competition. Qwest presumes that Qwest's own monopoly has been dissolved, effective competition is a reality, and all carriers have equal bargaining power. This is simply not the case.

The fact is that the filing and approval provisions of sections 251 and 252 stand as critically important protections for new entrants in the local exchange marketplace. Without these provisions, ILECs would be free to discriminate between the new entrants, negotiating with whomever they choose, and more importantly, *refusing* to negotiate with whomever they choose. This is not a hypothetical argument. Qwest's own Comments suggest the ILEC may refuse to provide same or similar arrangements provided to other carriers.[8]

By bringing these negotiated agreements into the light of day, discriminatory treatment by the ILEC can be reduced or eliminated. As the FCC has explained, "requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms."[9]

---

[8] "If the ILEC agrees (and Qwest for one tries to accommodate the specific requests of all its CLEC customers), that contract term can also take effect immediately without prior Commission review. If the ILEC disagrees, the CLEC can arbitrate under the broader "any issue" standard of Section 252(b)." Qwest's Comments at 14. Qwest is saying that if it cannot reach agreement on non-rate matters it alleges need not be filed, the CLEC will have to arbitrate. This is inconsistent with section 252(i) and 47 C.F.R., § 51.809, which states that the ILEC shall make available any individual arrangement without unreasonable delay.

[9] See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499, ¶ 167 (1996) ("*Local Competition Order*").

In fact, the FCC has rejected the notion that sections 251 and 252 should be narrowly construed, and instead has adopted a broad view of the filing and approval requirements of the Act, interpreting those requirements as applying to all categories of interconnection agreements:

> We conclude that the 1996 Act requires all interconnection agreements, "including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996," to be submitted to the state commission for approval pursuant to section 252(e). *The 1996 Act does not exempt certain categories of agreements from this requirement.* When Congress sought to exclude preexisting contracts from provisions of the new law, it did so expressly.[10]

To the extent that Qwest seeks to exclude any agreement relating to interconnection prices, terms, or conditions from the filing and approval process, it must provide an express statutory exclusion. However, Qwest has not done so. Nor can it, because no such exclusion exists.

The FCC went on to explain its rationale for this broad, inclusive approach:

> State commissions should have the opportunity to review all agreements, including those that were negotiated before the new law was enacted, to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest.... Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i)....
>
> Conversely, excluding certain agreements from public disclosure could have anticompetitive consequences. For example, such contracts could include agreements not to compete. In addition, if we exempt agreements between neighboring non-competing LECs, those parties might have a

[10] *Id.* ¶ 165 (emphasis added).

> disincentive to compete with each other in the future, in order to preserve the terms of their preexisting agreements.[11]

Thus, the FCC itself endorses a broad interpretation of the nature of agreements which are subject to the filing and approval requirements of section 252. The FCC's approach here is inclusive, rather than exclusive.

Qwest attempts to construct an argument that a narrow reading of section 252 is justified based on the lengths of the different approval processes for voluntary interconnection agreements, arbitrated interconnection agreements, and SGATs. Qwest asserts that because the approval process is 90 days for voluntary agreements, only 60 days for an SGAT, and only 30 days for an arbitrated agreement, the conclusion should be reached that only a certain limited "type" of agreement should be subject to the filing and approval process. However, as previously noted, the Act states that *both* negotiated and arbitrated agreements are subject to the approval process, as are SGATs. The fact that the statute grants more time for the examination of voluntary agreements is simply a recognition by Congress that voluntary agreements will require greater scrutiny, because they represent a greater danger of discriminatory treatment.[12] The private nature of these voluntary agreements means that they may be crafted to the unfair advantage of the parties, and to the detriment of third parties. Arbitrated agreements, on the other hand, have received scrutiny from an independent third party. In addition, because of their broad applicability, SGATs have the attention of a broad spectrum of carriers, each of which has the ability to object to new provisions as they are put into place.

---

[11] *Local Competition Order*, ¶ 167-8.

[12] As the FCC also noted, the agreements may contain an agreement not to compete, which would be anticompetitive. *Local Competition Order*, ¶ 168. *See* Confidential [Letter] Agreement dated November 15, 2000, between Greg Casey, Qwest, and Richard A. Smith, Eschelon Telecom, Inc.: "Eschelon agrees to not oppose Qwest's efforts regarding Section 271 approval or to file complaints before any regulatory body concerning issues arising out of the parties' Interconnection Agreements." Not only does this clause amend the Interconnection Agreement, necessitating approval by the Commission, it is not in the public interest.

In short, the filing, approval, and "pick and choose" requirements of section 252 have an important purpose: to prevent ILECs, who have no incentive to deal fairly with CLECs, or indeed to deal with them at all, from engaging in discriminatory, anticompetitive behavior towards those CLECs. A narrow reading of these filing, approval, and "pick and choose" requirements will frustrate that purpose, and allow ILECs to engage in wholesale discrimination against CLECs who pose a genuine competitive threat. It is only a broad reading of those requirements which will protect new entrants, and ultimately further the pro-competitive intentions of the Act.

### C. Qwest's Strained Interpretation of Section 252(a)(1) Seeks to Eviscerate the Nondiscrimination Provisions of That Same Section, and Frustrate the Intent of the Act

Qwest attempts to argue that section 252(a)(1) limits the applicability of the filing and approval requirements of section 252. Qwest asserts that the fact that section 252(a)(1) requires inclusion of a detailed schedule of charges for interconnection, each service or network element means that any agreement which does not contain such a detailed schedule is not subject to the filing and approval requirements.[13] Such a strained interpretation would eviscerate the nondiscrimination requirements of the remainder of section 252, and lead to a situation in which an ILEC could discriminate against individual CLECs with impunity, on the terms and conditions of interconnection. Such a result would be clearly contrary to the letter and spirit of the Act. Although the Act states that the agreement shall include a "detailed schedule of itemized charges," the next sentence states that the "agreement" shall be filed with the Commission, not simply the "detailed schedule of itemized charges." The Act clearly means that the parties can

[13] Qwest's Comments at 8-11.

negotiate without regard to section 251(b) and (c) but the agreement must contain a detailed schedule of itemized charges, the entirety of which must be filed with the Commission.

Qwest would have the Commission believe that because the Act requires the agreement to include a "detailed schedule of itemized charges," the itemized list of charges is all that needs to be filed with the Commission.[14]

> Furthermore, the substantive impact of this result should not be exaggerated either. Again, *rates and charges are available under Section 252(i)*. These are the most important "pick and choose" matters. To the extent that an ILEC and a CLEC reach agreement on non-rate matters, the only relevant impact on a competing third party CLEC is that it has to ask for the same or similar agreement. If the ILEC agrees (and Qwest for one tries to accommodate the specific requests of all of its CLEC customers), that contract term also can take effect immediately without prior Commission review. If the ILEC disagrees, the CLEC can arbitrate under the broader "any issue" standard of Section 252(b). Parties also can file complaints if they believe discrimination is occurring.[15]

Qwest argues that rates and charges are available pursuant to section 252(i). This is true, but section 252(i) states that a carrier can get the same terms and conditions as provided for in the agreement. Section 252(i) does not even use the term "rate" or "charges." Qwest argues that rates and charges "are the most important 'pick and choose' matters to CLECs." This is pure speculation. AT&T has an interest in all contractual provisions obtained by other carriers regarding interconnection, services and network elements.

Interconnection agreements contain much more than prices. Indeed the bulk of a typical interconnection agreement relates not to pricing but to terms and conditions, each of which have been the subject of painstakingly negotiations, review, and argument. Allowing only a narrow reading of section 252 will result in a myriad of discriminatory

---

[14] Qwest's Comments at 8-9.
[15] *Id.* at 14.

amendments to these agreements, and will license preferential treatment of some CLECs by Qwest, with respect to the terms and conditions of interconnection, services and network elements.

The language of section 252(a)(1) must be read in context, and not in a vacuum as Qwest would prefer. Where interconnection agreements can be arrived at through voluntary negotiations, then certainly the Act prefers that approach. But the Act still imposes the filing and approval requirements on voluntary agreements, just as it does arbitrated agreements.[16] Section 252(e) requires that "any" interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the state commission. Furthermore, the grounds for rejection of an interconnection agreement are clear: such an agreement must be rejected, *inter alia*, if the agreement *or any portion thereof* discriminates against a telecommunications carrier not a party to the agreement. The nondiscrimination requirements of section 252(e) are an integral part of the approval requirements of that same section, as well as the filing requirement of section 252(h). In turn, these nondiscrimination requirements are implemented and enforced by way of the "pick and choose" requirement found in section 252(i) of the Act and the FCC's rules. Each of these nondiscrimination protections is as applicable to terms and conditions as it is to price.

A very troubling aspect of Qwest's analysis is the suggestion that another carrier has to ask Qwest to see the "non-rate matters" and obtain the "same or similar arrangements." According to Qwest, if Qwest disagrees, the carrier has to arbitrate. This, without doubt, contradicts the provisions of section 252(e), which states explicitly

[16] It should be noted that Qwest has forced AT&T to arbitrate each and every one of the interconnection agreements it has with AT&T. The argument that Qwest, or any other ILEC, is eager to deal with new entrants on equal terms is not credible.

that another state carrier can get the "same terms and conditions." Section 252(e) states nothing about a carrier having to arbitrate if the BOC disagrees with the request. The FCC's rule requires that the ILEC make the arrangement available "without unreasonable delay."[17]

The language of the Act, when read in its entirety and unencumbered by Qwest's narrow reading, calls for a broad interpretation of what agreements are subject to State commission approval, filing, and "pick and choose." Not only should "any" interconnection agreement be filed with the State commission, but the Commission may reject it if even a *portion* of the agreement is found to be discriminatory. Additionally, when asked about the applicability of the filing, approval, and nondiscrimination requirements of section 252, the FCC clearly chose to use an expansive interpretation of which agreements should be subject to those requirements. Qwest's strained interpretation of section 252(a)(1) should be summarily rejected.

## D. Qwest's "Policy" Arguments Lack Merit

### 1. Where to Draw the Line

Qwest makes a number of arguments to justify not having to file all related agreements. All of them attempt to support its argument that the line should be drawn in its favor. The problem with Qwest's approach is that it attempts to make a standard when one is already embodied in the Act -- is the agreement, or portion thereof, related to the provision of interconnection, services or unbundled network elements?[18]

---

[17] 47 C.F.R., § 51.809(a).

[18] This question also applies to any amendments to the terms of an existing interconnection agreement. One cannot file an interconnection agreement with the Commission for approval and argue amendments to the agreement do not have to be filed with the Commission for approval.

Qwest suggests that contract provisions defining business-to-business matters, dispute resolution or other administrative matters should not come under the provisions of section 252. Qwest argues that contract provisions that settle ongoing disputes and litigation between the parties should not be covered. Furthermore, Qwest argues matters not subject to section 251 should not be included.[19]

AT&T disagrees with Qwest. Qwest provides an example of administrative detail. For example, Qwest argues that "whether a dispute resolution term has a six-level escalation process before litigation or a five-level process, are matters properly worked out by the parties and are not within the scope of regulatory review under Section 252." AT&T disagrees, especially if the subject matter is whether or not Qwest will provide a network element, interconnection or services. Why should one carrier have to jump through one more hoop? It may be a welcome hoop, for example, a personal meeting with Joe Nacchio.[20] The additional step may be either a barrier or a welcome step. The process, therefore, is potentially discriminatory. If contained in an agreement related to interconnection, services or network elements, it falls within the scope of section 252.

Litigation settlements should be reviewed using a similar analysis. AT&T is concerned that some settlements regarding terms and provisions common to multiple interconnection agreements are entered into on a discriminatory basis. For example, if a party pays another party a sum to settle a dispute that is common to multiple carriers, all carriers similarly situated should be aware of the settlement. If a part of the settlement is a term that says that a CLEC will receive up to a $16.00 credit per line on UNE-P every

[19] Qwest's Comments at 6.

[20] *See* Confidential Agreement dated November 15, 2000, between Qwest and Eschelon at ¶ 3 for such a provision. This agreement explicitly provides 6 levels of escalation procedures, the fifth level being a meeting between CEOs. (This agreement was made public in Minnesota and is no longer confidential.)

time the Daily Usage Files ("DUF") are inaccurate, preventing the CLEC from billing other carriers for switched access, this agreement must be filed because other CLECs would be discriminated against if they also did not get a similar per line credit every time the DUF that were supplied were inaccurate.[21] Such a credit provides too great an economic benefit to the CLEC negotiating the settlement and puts other CLECs at an obvious economic disadvantage.[22]

Qwest inappropriately attempts to exclude certain services from the section 252(e) filing requirements. Qwest tries to exclude FCC-regulated interstate common carrier service and state-regulated interstate long distance service. However, the FCC has stated that there are no restrictions, with minor exceptions, on the use of network elements. 47 C.F.R. § 51.307(c). In other words, interexchange carriers can use UNEs to provide service. The provision of information services and network elements that do not satisfy the statutory "necessary" and "impair" standards are not automatically exempt since, for example, the provision of these services may be so interrelated to section 251 services to make filing necessary. For example, Qwest may agree to provide voice messaging, which it has maintained it is not obligated to provide. Other carriers should have the same legal right to opt-in to such agreements. Furthermore, section 252(a)(1) of the Act states that carriers can negotiate without regards to the standards set forth in sections 251(b) and (c), but the Act also makes clear those agreements must be filed with the Commission for approval. Qwest's interpretation would seriously undermine this requirement.

---

[21] *See* Letter Agreement dated July 3, 2001, from Audrey McKenney, Qwest, to Richard A. Smith, Eschelon Telecom, Inc., at 2. The OSS test in Arizona and the Regional Oversight Committee test both found problems with the provision of DUF records in Arizona and the remaining 13 Qwest states.

[22] It should not go unnoticed that Eschelon, before it was silenced, was the most vocal critic of Qwest's performance in providing UNE-P.

Under each of the classifications proposed by Qwest, a carrier can be discriminated against in the provision of interconnection, services, and unbundled network elements if the agreement is not filed. Qwest's rationale for drawing the line are not appropriate or legally sustainable.

### 2. Qwest's Reading of Section 252 will Restrict Competition

Qwest would have the Commission believe that having to file agreements with carriers will restrict competition. According to Qwest, the delay in filing may have economic effects.[23] It may "hinder local competition by making impossible collaborative agreements between ILECs and CLECs."[24] Qwest argues that having to file agreements may create a disincentive to negotiate. Qwest also argues that an overboard interpretation will create uncertainty regarding contractual arrangements that involve multi-state operations.[25] Finally, Qwest argues that an overboard interpretation may raise compliance costs and impose additional administrative delays.[26] None of these arguments provide a basis for Qwest's position that it should not have to file agreements.

First, the Act creates the basic structure for negotiation. The process is initiated by a carrier requesting negotiation. The process is spelled out and must be followed. Qwest argues that having to comply with the law takes too much time, so it asks the Commission to interpret it in a manner to allow it to get around the Act's provisions. This is unacceptable. What Qwest fails to understand is that *all* carriers are in the same situation; if every carrier is treated equally, there is no discriminatory economic effect. The Act does not make voluntary negotiations impossible. It, in fact, permits voluntary

---

[23] Qwest's Comments at 15.
[24] *Id.*
[25] *Id.* at 16-17.
[26] *Id.* at 18.

negotiations. The result of the negotiations – the agreement – must be filed for approval, however.

Qwest forgets that the Act was passed to make negotiations possible, as the BOCs generally refused to cooperate, negotiate, interconnect, resell services and provide network elements before the Act was passed. To say that an Act that was passed to *require* negotiations in some way *hinders* negotiations, negotiations that would not take place but for the Act, is ludicrous.

Qwest argues that an overboard interpretation will create uncertainty regarding multi-state negotiations. Once again, Qwest does not like provisions of the Act. In this case, it is a provision that grants a State commission authority to determine whether a negotiated agreement is discriminatory, whether the agreement is in the public interest, convenient and necessity and whether the State Commission wishes to establish or enforce State law pursuant to Section 252(e)(3). In other words, Qwest wishes to avoid having each State commissions enforce or establish State law requirements, as permitted by the Act. The Act does not prohibit multi-state negotiations. The Act simply requires that the agreement be filed with the State commissions for approval.[27]

Finally, Qwest argues that filing contracts may raise compliance costs. Qwest argues that "[a]dding an unnecessary layer of State Commission review would impose administrative delays on the parties to these agreements..."[28] As noted earlier, all parties are treated equally by any "delay" imposed by the Act. Furthermore, Qwest argues that the Commission's review is "unnecessary." AT&T must strongly disagree. AT&T has explained the statutory interests and obligations of the Commission in reviewing

[27] Nothing prohibits Qwest from filing the agreement in all effected states at the same time, in which case the 90 day period would run concurrently in all states.
[28] *Id.*

agreements.[29] More importantly, however, is that Congress added an approval requirement, which makes this debate moot.

Qwest ignores the foundations of the Act and some of the reasons why the Act was passed -- essentially, to enforce the BOCs to negotiate with carriers for the provision of interconnection, services, unbundled network elements and to prevent BOCs from treating carriers differently, whether because of unequal bargaining power or dislike for any particular carrier. By being permitted to negotiate in secret, Qwest regains some of the bargaining advantage lost through passage of the Act and once again would be permitted to discriminate and enter into agreements that are not in the public interest.

The public policy favoring the elimination of discriminatory or preferential treatment by the monopoly carrier would appear to outweigh all of these purported policy arguments, even in the aggregate. Qwest, however, has largely ignored the antidiscrimination provisions of sections 251 and 252.

The imposition of administrative burdens in this particular situation would appear to be unavoidable, if one is intent on providing fair treatment to new entrants in a currently monopolistic market. Furthermore, the administrative burdens of sections 251 and 252 appear slight in comparison to the damage to competitors and consumers which could, and would, be incurred if Qwest were allowed to deal in a free-wheeling manner with its new competitors, and wield its considerable market power without restraint. On the other hand, focusing on the administrative burdens imposed by the entire Act, and not just sections 251 and 252, still leads to the conclusion that the overarching policy

[29] A commission may very well violate the Act by not requiring Qwest to file the agreements for approval because the Act spells out specific obligations of the State commission in reviewing interconnection agreements

consideration behind the federal Act -- the fostering of competition on a national scale -- outweighs the administrative burdens imposed by the Act.

A broader reading of sections 251 and 252 provides Qwest with something it lacks: an incentive to refrain from discriminatory treatment of new entrants. Otherwise, to the extent Qwest is able to rapidly -- and secretly -- settle disputed issues with CLECs, it has the incentive and the ability to craft its settlements in such a way as to disadvantage some of its competitors, or at a minimum, preclude some from having the same advantages as others.

Qwest argues that a broader reading of sections 251 and 252 introduces a higher level of uncertainty into the contractual relationship between the ILEC and other carriers. However, as stated previously, the resulting legal uncertainty which may be imposed on the parties for a brief 90-day period is a small price to pay for the fair and equitable treatment of all new entrants. In addition, such delay will indeed provide a disincentive to enter into discriminatory agreements in the first place.

The reality is that ILECs have little or no incentive to negotiate with potential competitors and every incentive to engage in discrimination to prevent any significant erosion of their local monopolies. Conversely, an individual CLEC, especially a smaller one, has little incentive to resist a settlement or other agreement which discriminates against other CLECs, because of the potential benefits it might derive from such an agreement, as well as the potential detriment which might result to its own competitors.

Qwest argues that if it has to file every contract it would be subject to contracts to "pre-effective date micro-management."[30] That is nonsense. Once again, the Act was passed, in part, because of BOC intransigence in negotiating with competitive carriers.

[30] *Id.*

The Act was passed to force BOCs to operate within statutorily-defined procedures. Qwest may not like those procedures, it may believe it cramps its style, but that is simply too bad. The goals and provisions of the Act are paramount.

The protections afforded by the filing, approval, and "pick and choose" provisions of sections 251 and 252 remain, in the words of the FCC, "central to the statutory scheme and the emergence of competition."[31] They are necessary and appropriate protections for CLECs and, unlike Qwest's wishful interpretation, address the true incentives of ILECs in their dealings with new entrants.

## E. Scope of An Interconnection Agreement

In 1996, when AT&T started negotiations with U S WEST, U S WEST proposed the use of an agreement that AT&T believed omitted key terms that are usually contained in contractual agreement between two commercial entities. Accordingly, AT&T provided a more detailed version of a proposed interconnection agreement. The detail and scope of the agreement was a key sticking point during the arbitration. U S WEST wanted to fill in contractual details later, after the arbitration was complete and commercial dealings commenced. AT&T wanted certainty in its commercial dealings. Generally, AT&T's view prevailed before the State commissions.

Qwest makes a number of arguments regarding the scope of an interconnection agreement. Qwest discusses a number of provisions that it believes "do not address core terms of interconnection or network elements."[32] Qwest identifies escalation and disputes provisions as an example. AT&T believes these are key contractual provisions.

---

[31] *Local Competition Order*, ¶ 1309.
[32] Qwest's Comments at 22.

What Qwest is attempting to do is relitigate the issue raised more than 5 years ago -- the detail an interconnection agreement should contain. If Qwest prevails, carriers will, once again, be arguing that certain provisions should be in an interconnection agreement, and Qwest will be arguing the issues are not core terms or are non-rate terms and can be addressed in separate agreements (that, of course, need not be filed with the Commission for approval.) Not only does this create contractual uncertainty, shift risk to carriers but is potentially discriminatory.

Finally, it is inconsistent with the scope and breath of Qwest's SGAT. Qwest argues SGATs are different because they are subject to different procedural rules.[33] The difference Qwest is referring to is the approval process. However, there is no doubt that the SGAT contains provisions that Qwest and the other carriers consider essential. Whether the Commission has 60 or 90 days to approve the SGAT terms is irrelevant to the scope and contents in the SGAT.

Qwest's position raises the possibility that by making negotiations and "pick and choose" more difficult, a carrier will be more inclined to adopt the SGAT to avoid long, protracted negotiations. The Act provides 3 methods for a carrier to enter into an agreement with an ILEC – negotiation, arbitration, or SGAT – and all agreements must be filed with the State commission for approval. Although the approval periods may differ, 90, 30 and 60 days, respectively, this alone provides no basis for exempting negotiated agreements from the filing requirement contained in the Act.

[33] *Id.* at 8.

## F. The Public Agreements[34]

Qwest has publicly disclosed a number of agreements to the parties. These agreements in most cases are marked confidential or trade secrets. Qwest publicly disclosed those documents in Minnesota and subsequently in Arizona. The confidential and trade secret designations for these limited agreements can be disregarded.

AT&T believes the public agreements show without a doubt that Qwest has failed to file agreements pursuant to section 252(e). Moreover, these agreements contain terms that are likely not in the public interest and that are discriminatory if they are not made available to other carriers.

Eschelon Telecom, Inc. entered into a significant number of agreements with Qwest that were not filed with the Commission. Eschelon was also a vocal critic of Qwest's provision of network elements, specifically UNE-P, during the first workshop on UNE-P in Arizona. Miraculously, Eschelon did not appear at the follow-up UNE-P workshops on November 15, 2000. Whether Eschelon's problems were resolved are subject to debate; however, what is not subject to debate is that on November 15, 2000, Qwest made an offer Eschelon apparently could not refuse. As part of the offer, Eschelon had to agree "not to oppose Qwest efforts regarding Section 271 approval or to file complaints before any regulatory body concerning issues arising out of the Parties' Interconnection Agreement."[35]

---

[34] *See* G. Confidential Agreements, *infra*, for discussion of the confidential agreements.
[35] Confidential [Letter] Agreement dated November 15, 2000, from Greg Casey, Qwest to Richard A. Smith, Eschelon.

### 1. Eschelon Agreements

#### a. Confidential/Trade Secret Stipulation Between ATI and U S WEST Dated February 28, 2000

By terms of this agreement, Qwest agreed to implement wholesale service quality measures, or "Service Performance Measurements," in the states Eschelon does business. Qwest also agreed to pay Eschelon compensation for internet-related terminating traffic "at the most favorable rates and terms contained in an agreement executed by USWC." ¶ 7.[36]

Qwest also agreed to dedicate an on-site "coach" "who is knowledgeable of and experienced in working with all different groups and functions within USWC related to provisioning." ¶11.

#### b. Confidential [Letter] Agreement Dated November 15, 2000, from Greg Casey, Qwest, to Richard A. Smith, Eschelon Telecom, Inc.

The November 15 agreement establishes escalation procedures. The procedure contains 6 levels. The fifth level is CEO-to-CEO discussions. The sixth level is the initiation of litigation in either federal or state court.

#### c. Confidential Amendment to Confidential/Trade Secret Stipulation Dated November 15, 2000, Between Qwest and Eschelon Telecom, Inc.

The agreement was intended to resolve disputes raised by Eschelon having to provide services to its customers using resale instead of through network elements. ¶ 1. "For any month (or partial month), from November 1, 2000 until the mechanized process is in place, during which Qwest fails to provide accurate daily usage information for Eschelon's use in billing switched access, Qwest will credit Eschelon $13,00 (or pro rata

[36] This clause raises an interesting question: how would Eschelon know it is getting most favorable rates if Qwest does not file *all* agreements?

portion thereof) per Platform line per month as long as Eschelon has provided the WTN information to Qwest." ¶ 2. Eschelon agreed to provide "consulting and network-related services." In exchange, Eschelon received a 10% discount on aggregate billed charges for the period November 15, 2000, through December 31, 2005. ¶ 3.

**d. Letter Agreement Dated July 3, 2001, from Audrey McKenney, Qwest, to Richard A. Smith, Eschelon Telecom, Inc.**

Eschelon alleged that the switched access minutes recorded in the tapes provided by Qwest going to Eschelon's platform services were less than the amount of minutes going through Eschelon's switch. Qwest agreed to increase the $13.00 Interim Amount from $13.00 to $16.00 per line per month. The partners agreed to perform an audit and true up the differences between the Interim Amount and the actual amount Eschelon was able to bill interexchange carriers.

**e. Qwest/Eschelon Implementation Plan Dated July 31, 2001**

The Implementation Plan provides for regular meetings to address Eschelon service-related issues. ¶¶ 2.3 and 2.5. The Agreement also provides an escalation chart, ¶2.2 and Attachment 2, and a detailed methodology for calculating local usage charges associated with UNE-P switching, ¶3.1 and Attachment 3. The Agreement also addresses coordinated conversion of Qwest enhancements to the UNE-P. ¶8.

**f. Settlement Agreement Dated March 1, 2002, between Qwest and Eschelon Telecom, Inc.**

In exchange for $7,912,000 Eschelon released Qwest from all secret agreements, except Attachment 3 to the Implementation Plan dated July 31, 2001, which the parties

agreed will be made part of the Interconnection Agreement. ¶ 3. The parties agreed to work out a number of additional UNE-P issues. *Id.*

After 2 years of secret negotiations and agreements, Qwest and Eschelon terminated all public secret agreements and decided to amend the Interconnection Agreement where necessary. During that period, Eschelon received preferential treatment that the other carriers did not receive. However, after the agreements became public, Eschelon mutually agreed to terminate the secret agreements, and Eschelon received over 7 million dollars. By terminating the agreements, Qwest did not have to make the terms available to other CLECs. The other carriers received nothing and never had an opportunity to obtain the benefits of the Eschelon agreements or individual arrangements pursuant to section 252(i) or 47 C.F.R, §51.809(a). This hardly seems consistent with public policy or the terms of the Act. Yet, this would be entirely appropriate under Qwest's vision of section 252. AT&T could not provide a better example of why Qwest's position cannot be permitted to prevail.

**2. Remaining Public Agreements**

Qwest entered into additional secret agreements with Covad Communications Company, McLeod USA, Inc., SBC Telecom, Inc., and WorldCom, Inc., as reflected in the publicly-available agreements. AT&T sees little point in going through each of the agreements at length, as the Eschelon agreements are obviously subject to the filing requirements of section 252(e).

However, AT&T will briefly point out a few provisions of the agreements. The Covad agreement addresses Firm Order Conformation ("FOC") intervals. Qwest agreed to provide 90% of Covad's FOC dates within 48 hours of receipt of a properly completed

service request for POTs unbundled loop service.[37] McLeod USA entered into agreements that contain terms on subscriber list information charges, reciprocal compensation arrangement for local and internet-related traffic[38] quarterly meetings and escalation procedures (including CEO meetings).[39] Qwest agreed to process SBC Telecom, Inc.'s service orders for the establishment and testing of SBCT's network upon execution of the secret agreement but prior to state approval of the interconnection agreement.[40] Obviously, all these agreements should have been filed with the Commission for approval.

## G. Confidential Agreements

Confidential Agreements are discussed in Confidential Exhibits A and B.

## III. CONCLUSION

Contrary to Qwest's assertions, the pro-competitive tenor of the federal Act requires that the filing, approval, and "pick and choose" requirements of sections 251 and 252 of the Act be read in a broad, expansive manner. These provisions are critically important protections for new entrants in the local exchange marketplace. Without them, ILECs would be free to discriminate between the new entrants, negotiating with whomever they choose, and more importantly, *refusing* to negotiate with whomever they choose. By bringing these negotiated agreements into the light of day, discriminatory treatment by the ILEC can be reduced or eliminated. As the FCC has explained,

---

[37] U S WEST Service Level Agreement with Covad Communications Company-Unbundled Loop Services, dated April 19, 2000.
[38] Confidential Billing Settlement Agreement dated April 28, 2000, between Qwest and McLeod USA, Inc.
[39] Confidential [Letter] Agreement dated October 26,2000, from Greg Casey, Qwest, to Blake Fisher, McLeod USA, Inc..
[40] Letter agreement dated June 1, 2000, from Kathy Fleming, Qwest, to Thomas W. Hartmann, SBC Telecom, Inc.

"requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms."[41]

Thus, the FCC itself endorses a broad interpretation of the nature of agreements which are subject to the filing and approval requirements of section 252. The FCC's approach here is inclusive, rather than exclusive.

Qwest's strained interpretation of section 252(a)(1) should be summarily rejected, as should its asserted "public policy" arguments.

Dated this 24th day of May, 2002.

**AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC., AND TCG PHOENIX**

By: Richard S. Wolters

Richard S. Wolters
AT&T
1875 Lawrence Street, Suite 1503
Denver, Colorado 80202
(303) 298-6741
rwolters@att.com

Gregory H. Hoffman
AT&T
795 Folsom Street, Suite 2161
San Francisco, CA 94107-1243
(415) 442-3776
ghoffman@att.com

[41] *Local Competition Order*, ¶ 167.

# Confidential Exhibit A

Docket RT-00000F-02-0271
AT&T's Comments Dated 5/24/02

# Highly Confidential
# Exhibit B

Docket RT-00000F-02-0271
AT&T's Comments Dated 5/24/02

## CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of **AT&T's Comments on Section 252(e) of the Act and Response to Qwest's Comments Regarding Filing Obligations dated May 24, 2002**, Docket No. RT-00000F-02-0271, were sent by Overnight Delivery on May 24, 2002 to:

Arizona Corporation Commission
Docket Control – Utilities Division
1200 West Washington Street
Phoenix, AZ 85007

and that a copy of the foregoing was sent by Overnight Delivery on May 24, 2002 to:

*Christopher Kempley, Chief Counsel
Arizona Corporation Commission
Legal Division
1200 West Washington
Phoenix, AZ 85007

*Maureen Scott
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007

*Earnest G. Johnson, Director
Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007

*Judge Jane Rodda
Arizona Corporation Commission
400 W. Congress
Tucson, Arizona 85701

and a true and correct copy was sent by U.S. Mail, postage prepaid, on May 24, 2002 to:

*Eric S. Heath
Sprint Communications Company L.P.
100 Spear Street, Ste. 930
San Francisco, CA 94105

QWEST Corporation
1801 California Street, #5100
Denver, Colorado 80202

*Joan Burke
Osborn Maledon
2929 North Central Avenue, 21st Floor
P.O. Box 36379
Phoenix, AZ 85012-2794

Maureen Arnold
U S WEST Communications, Inc.
3033 N. Third Street, Room 1010
Phoenix, Arizona 85012

*Timothy Berg
FENNEMORE CRAIG
3003 N. Central Ave., Suite 2600
Phoenix, Arizona 85016

Gregory Hoffman
795 Folsom Street, Room 2159
San Francisco, CA 94107-1243

* Received Confidential Exhibits A and B.

Thomas F. Dixon
MCI TELECOMMUNICATIONS CORP
707 17th Street, #3900
Denver, Colorado 80202

Michael M. Grant
GALLAGHER AND KENNEDY
2575 East Camelback Road
Phoenix, Arizona 85016-9225

Bradley Carroll
Cox Arizona Telcom, L.L.C.
20401 N. 29th Avenue, Suite 100
Phoenix, Arizona 85027

Mark Dioguardi
TIFFANY AND BOSCO PA
500 Dial Tower
1850 N. Central Avenue
Phoenix, Arizona 85004

Nigel Bates
ELECTRIC LIGHTWAVE, INC.
4400 NE 77th Avenue
Vancouver, Washington 98662

Darren S. Weingard
Stephen H. Kukta
SPRINT COMMUNICATIONS CO L.P.
1850 Gateway Drive, 7th Floor
San Mateo, California 94404-2467

*Thomas H. Campbell
LEWIS & ROCA
40 N. Central Avenue
Phoenix, Arizona 85007

Jon Loehman
Managing Director-Regulatory
SBC Telecom, Inc.
5800 Northwest Parkway
Suite 135, Room 1.S.40

*Scott S. Wakefield, Chief Counsel
Dan Pozefsky
RUCO
2828 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004

Andrew O. Isar
TRI
4312 92nd Avenue, N.W.
Gig Harbor, Washington 98335

Richard M. Rindler
Morton J. Posner
SWIDER & BERLIN
3000 K Street, N.W. Suite 300
Washington, DC 20007

Michael W. Patten
ROSHKA HEYMAN & DEWULF
400 E. Van Buren, Suite 800
Phoenix, Arizona 85004

Thomas L. Mumaw
Jeffrey W. Crockett
SNELL & WILMER
One Arizona Center
Phoenix, Arizona 85004-0001

Joyce Hundley
UNITED STATES DEPARTMENT OF JUSTICE
Antitrust Division
1401 H Street NW, Suite 8000
Washington, DC 20530

Mark P. Trinchero
DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201

Daniel Waggoner
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688

* Received Confidential Exhibits A and B.

San Antonio, Texas 78249
Lyndall Nipps
Director, Regulatory
Allegiance Telecom, Inc.
845 Camino Sure
Palm Springs, California 92262

M. Andrew Andrade
5261 S. Quebec Street, Suite 150
Greenwood Village, CO 80111
Attorney for TESS Communications, Inc.

Diane Bacon, Legislative Director
COMMUNICATIONS WORKERS OF AMERICA
5818 North 7th Street, Suite 206
Phoenix, Arizona 85014-5811

Al Sterman
ARIZONA CONSUMERS COUNCIL
2849 E 8th Street
Tucson Arizona 85716

*Brian Thomas
TIME WARNER TELECOM, INC.
520 S.W. 6th Avenue, Suite 300
Portland, Oregon 97204

Robert S. Tanner
3311 3rd Street N
Arlington, VA 22201-1711

Jim Scheltema
Blumenfeld & Cohen
1625 Massachusetts Ave. N.W., Suite 300
Washington, DC 20036

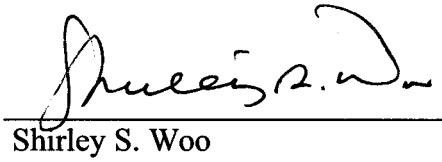
Todd C. Wiley
GALLAGHER & KENNEDY
2575 E. Camelback Road
Phoenix, Arizona 85016-9225

Laura Izon
COVAD COMMUNICATIONS CO
4250 Burton Street
Santa Clara, California 95054

Mark N. Rogers
Excell Agent Services, L.L.C.
2175 W. 14th Street
Tempe, Arizona 85281

Jon Poston
ACTS
6733 E. Dale Lane
Cave Creek, Arizona 85331-6561

Executed on May 24, 2002 in San Francisco, California.



Shirley S. Woo

* Received Confidential Exhibits A and B.